1947.

File No. O Cr P C/47

Legal Deptt

A BRANCH

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Subject:—

Opinions under the

Code of Criminal

Procedure 1898

File No. O Cr. P.C/47

52-A

C O N T E N T S.

Legal Department Volumn No.O.Criminal P.C/1947.

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33.	O.No.13007/16.12.47.	Re:Govt.sanction under Sec.6(b) of the Prevention of corruption Act,1947 to prosecute for offences under Sec.161,201,34, I.P.C.	143 -148
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36.	O.No.12419/27.12.47.	Re:Government sanctionunder Sec.197(1)of the Criminal Procedure Code to prosecute for offences under Secs.341, 384 and 161,I.P.C. Government sanction also under section 6(b) of the Prevention of Corruption Act,1947, as the accused is a police and Regenue Patil not removable without such a sanction.	165.172.
37.	R.I.No.347-Conf1.3.12.47. O.No.437-Conf1.10.12.47.	Re:Government sanction under Sec.197(1) of the Criminal Procedure code to prosecute for offences under Sec.409. I.P.C. Government sanction also under Sec.6(b) of the Prevention of corruption Act,1947 to prosecute for offence under Sec.~~Corruption~~5(2) of the Prevention of Corruption Act,1947. (Copies not taken)	173.180
38.	R.I.No.102-Conf1/6.3.48. O.No.141Conf1/3.3.48.	Re:R.I.A.'s No.437-Conf1 dated 10th December 1947.. Additionof a para to the sanction under sec.197(1) of the Criminal Procedure Code.	181-184.

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Office of the R.L.A.

The Circle Inspector not being a public servant who is not ~~xxxx~~ removable from his office save by or with the sanction of the Provincial Government and the offence under section 409 Indian Penal Code being one which cannot be said to have been committed while acting or purporting to act in execution of his duty, no sanctionof Government would be necessary under section 197 Criminal Procedure Code for his prosecution.

Sd/

Remembrancer of Legal Affairs.

U.R. to R.D.No.849,dated the 16th January 1947

EXN.11/6/

Office of the R.L.A.

An appeal from an order of acquittal is required to be filed within six months from the date of the order (See Artilce 157 of the Limitation Act). But delay can be condoned under section 5 of the Limitation Act if the Court is satisfied that there was sufficient cause for not preferring the appeal within the prescribed period. In the present case the order of acquittal on the charge under section 302 or section 304 Indian Penal Code was passed on 19th October 1945. Consequently the appeal is clearly time-barred and there being no sufficient reason for not referring the appeal within the period of six months from the date of theorder, the High Court is not likely to condone the dealy and admit the appeal.

Under section 476(1) read with sub-section (1) of section 195 of the Criminal Procedure Code the Sessions Judge could have ordered the prosecution of the Medical officer, Mr.H.H.Patel for perjury. It is now too late to move the Sessions Judge to take action againMr.H.M.Patel for perjury. In the circumstances the proper course would be to proceed with the departmental inquiry against Mr.Patel.

Sd/

Remembrancer of Legal Affairs.

U.O.R. to G.D.No.1947

dated the 26th February 1947.

EKN.11/6/

I Agree.

Section 475 of the Code of Criminal Procedure, 1898, provides for delivery of a criminal luantic to the care and custody of his relatives or friends, but it does not contemplate ~~xxxxx~~ temporary release. Specific provision is however, made in section 33 A of Indian Lunacy Act,1912, providing for temporary release. ~~Xxxxxxxxxxxxx~~ of launtic detained under the provisions of section 7,10,14,15 or 17 for a period not exceeding sixty days. This section, however, does not refere to section 24 under which lunatic criminals are detained in an asylum. Consequently, a criminal lunatic cannot be temporarly released under Section 33A of the Indian Lunacy Act. Or. /section 475 Cr.P.C. The view expressed in H.D.office note dated 28.1.1947 is correct.

EKM.11/6/ Sd/.

Office of the R.L.A.

Seen and returned.

The view taken by the Home Department is correct.

Sd/

Remembrancer of Legal Affairs.

U.O.R. to H.D.No.1477

dated the 13th February 1947.

EKN.11/6/

L.D.R.I.No.83-Confl.,dated 24-3-47.

Submitted.

One Mr.Oza, who was formerly in Bombay Agriculture Service, has applied to Government for sanction under sec.197,Cri.P.C. for prosecuting Messrs.Ghanekar,Yavagal,Neurgaonkar and Shingvekar in respect of various offences punishable under section 409, 466, 471, and 477-A and some other sections of the I.P.C. alleged to have been committed by them in the discharge of official duties (vide petition at pp.1-3ante). The Deputy Director of Agriculture (Land Improvement)whose report Government called for states that:

> "3. If during the course of trial of the case either in the Court of the Additional Resident Magistrate or in that of the Additional Sessions Judge, any act of omission or commission on the part of any of the four officials)viz Messrs.A.D.Ghanekar, T.G.Yavgal,V.S.Neurgaonkar and M.L. Shingvekar) whom Mr.Oza seeks to prosecute had come to light, the trying Magistrate or the Sessions Judge would surely have brought it to the notice of Government for necessary action against the party concerned. Since this was not done, I do not see any reason why Mr.Oza should be granted permission to prosecute any of the four officials."

Government in R.C.D.proposes to accept the view of the Dy.Director and the papers are being shown to the R.L.A. for concurrence.

ALR. the view taken by the Deputy Director of Agriculture in para 3 of ~~his~~ his letter at p.9 ante is correct Papers may be seen and returned.

Sd/ R.T.K.

U.O.R. to R.C.D.No.3187dated 1-4-47.

BKH.11/6/

Office of the R.L.A.

"When powers privileges or property are granted by statute, everything indispensable to the exercise or enjoyment is impliedly granted also as would be in a grant between private persons"(see Maxwell p.310). Orders issued under section 42 of the Bombay District Police Act banning the carrying of lethal weapons imply powers of search necessary for executing those orders under section 54. The view taken by H.D. is correct.

Section 96 to 104, Criminal Procedure Code, relate to search warrants while section 165 provides for search by police officers for finding anything necessary for the purposes of an investigation. The Police have therefore powers to search houses withreference to incidents of information; but in other cases they will have to obtain search warrants. The view taken by H.D. on this point also is correct.

Sd,

Remembrancer of Legal Affairs.

H.R. to H.D.(Spl.No.3759 dated the 17th April 1947.

EKN.11/6/

Office of the R.L.A.

The R.L.A. is requested to advise on the relative powers of Honorary Magistrate and Justices of Peace with regard to attestation of documents.

There is no such terms as "Honorary Magistrate" defined in the Criminal Procedure Code. Any two or more persons appointed under section 15(1) or section 19 of the Criminal Procedure Code to constitute a Bench are ordinarily termed as Honorary Magistrates. It is presumed that by Honorary Magistrate, Home department means Magistrates as contradistinguished from Stipendiary* exercise the powers of a Magistrate and consequently the abolition there of would in no way hinder the attestation of documents even if such attestationis required by any law to be made by a Magistrate.

magistrate. In any case these Honorary Magistrate

The case of Justices of peace appears to be differer The question whether it is necessary to continue the appointment of Justices of Peace was considered by the R.L.A. in his U.R. to H.D.No.5808, dated the 12th November 1937. The attention of the Home Department is invited to paras.8,9,10 and 11 of that opinion where the question of attestation of documents by Justice of peace is considered.

Sd/

Remembrancer of Legal Affairs.

U.R. to H.D.No.1849, dated the 24th February 1947.

EKN.11/6/

Office of the R.L.A.

The first question raised for the consideration of the R.L.A. is whether the employer has a right to prevent a meeting of his employees on the grounds in view of the fact that the employees are resident on his estate.

"A strike is a cessation of work by a body of persons employed in any trade or industry acting in combination or a concerted refusal or refusal under a common understanding of any numberof persons who are or have been employed, to work or to accept employment. A strike is not in itself illegal. It is not illegal to persuade men legally to determine their contracts with their employer, or not to work for an employer" (see Halsbury Vol.XXXII,p.461) Labourers have an inherent right to form themselves into a trade union and to hold meetings for thepurpose of safeguarding their own interests and rights. "Meetings may be convened for any lawful purpose on any day and time and in any place provided such persons have the right to occupy that place."(see Cre.3rd edition; p.396). A public place is one where thepublic go, no matter whether they have a right to or not. Places like railway platforms, theatre halls and open spaces resorted to by the public for purposed of recreation, amusements etc. are public places (see Ratanlal's Law of crimes, p.381). It appears therefore that there would be no objection to the empooyees holding a meeting of their Union on an open space though such space belongs to the employer the fact that the employees are resent on the estate of their employer would make no difference.

The second question for consideration is whether Government can direct the District Magistrate to stop all police action and withdraw cases against persons already arrested and released or now under arrest in connection with the alleged

breach.....

breach of the orders issued under section 144 of the Criminal Procedure Code.

It is only the High Court that has power to consider whether or not the orders passed under section 144 of the Criminal Procedure Code are valid. Government has no power either to rescind such orders or to direct the District Magistrate to top all actions for the breach of such orders. The District Magistrate however, has power to rescind or alter orders made under section 144. Consequently Government may first call for a report from the District Magistrate and then consider whether it could be suggested to the District Magistrate to rescind the order passed by him under section 144 of the Criminal Procedure Code. If the order is found to be unwarranted by law, the District Magistrate himself will stop all actions for the breach thereof and the Public Prosecutor will take steps to withdraw all pending prosecutions.

Sd/

Remembrancer of Legal Affairs.

U.R. to P. and S.D.No.3761, dated the 17th April 1947.

EKN.11/6/

RLA

The question is what action could be legally taken against Dr.Uttamrao Girdhar Patil who has been doing objectionable preaching by means of provocative speeches in the District of East Khandesh. He made speeches at Patonda (Amalner Police Station), Patonda (Chalisgaon Police Station), Xxxxxx Wadala-Wadli, Mamurabad, Amalgaon and Kalamxx on 31st January, 26th January, 26th January, 8th February, 6th February, and 11th February 1947 respectively. Out of these, the first three and thelast speeches were not taken down verbatim. The fourth speech was considered free from objection. In respect of thefifth speech, namely, at Amalgaon, I gave an opinion that it was not actionable under section 4A or 153 A or 505 or 117 of the Indian Penal Code That was on 3rd March 1947. Since then the District Magistrate, East Khandesh, has reported that the purchase or grain and even movement of grain from Government godown in Amalner Taluka have been adversely affected by the preaching of Dr. Uttamrao. On the report, H.M. (H. D.). noted that action might be taken against Dr. Uttamrao. Below it the Hon'ble the Prime Minister made the following note:

> "I would like to know what is the action contemplated before I sign. I agree that some action is called for at once but in view of R.L.A's opinion,
>
> is.....

Is it under section 107?

~~It is under section 107.~~ Will there be evidence we must not fail and be made ridiculous. L.D. and H.D. must advise as to what section would be successful."

It is to be noted that the view of the Secretary H.D. has been consistently in favour of externment of Dr.Uttamrao. At p.85 of the file, however, H.M.(H. D) has noted that externment will not be appropriate in this case. Obviously the Hon'ble Minister means that externment will not be an adequate punishment. He desires that Dr.Uttamrao should be proceeded against under a specific section for a specific offence. The question therefore before us is whether an externment or a proceeding under section 107 of the Criminal procedure Code is legally feasible or whether both are feasible in law against Dr.Uttamrao. The view of the office is that an externment under section 40(3) of the Bombay District Police Act is not legally feasible, but that a proceeding under section 107 of the Criminal Procedure Code is feasible. I am, however, of the opinion that both are feasible.

2. Section 40(3) of the Bombay District Polic Act lays down as follows:

> "Where it appears to the Magistrate of a district etc. etc. that the movement or acts of any person in the district are causing or calculated to cause alarm, danger or harm to person or property etc.etc. the Magistrte may by a order in writing duly served on him or by beat of drum or otherwise as he thinks fit direct such person toremove himself outside the Province etc.etc."

The question therefore to be considered in this case for thepurpose of externment is whether the speeches of Dr.Uttamrao are causing or calculated to cause alarm, danger on harm to person or property of the people in the Districts of East Khandesh. In this connection attention....

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attention is invited to speech of Dr.Uttamrao delivered by him at Narwad on 23rd January 1947 in which amongst other things he said.

"After the departure of the British we have to destroy black state rulers, capitalists, Zamindars, Jahagirdars etc. who have been trained by them (British). We should therefore be prepared for that purpose .....but now we would take possession of Kacheries through the volunteers. Namlatdar, Collector, Fousdar or any other man who will obstruct in our work will require to be jailed."

It is clear from the report of the District Magistrate dated 11th February 1947 at p.37 of the file that as the result of theprovocative speeches of the Doctor made by him on 26th January 1947, the Head Constable of Police who was preparing his report in a school building at 12 midnight was assaulted and belaboured by three persons, namely, Arjun Viparu Tukaram Parashram and ~~Nathu~~Nathu Shivram. The Head Constable received injuries of the thumb and forehead and the glass of the lamp was smashed by one of his assailants. Furthermore, as the office has, noted this Dr.Uttamrao has been making inflammatory speeches ever since his return to the District of East Khandesh in 1946. It is true that the Doctor has toned down to acertain extent since the warning administered to him by the Hon'ble Minister (H. D.). Nevertheless, the speeches of thelast year, previous to the said warning, could be taken into consideration when we are dealing with a question of the

Doctor's.....

Doctor's externment from the District of East Khandesh. The tenor of his speeches in 1940 was, in the words of the office note, that "the People should enrol themselves in the Prati Sarkar Tufan Army which would march on any Mamlatdar's kacheri and loot the treasury and destroy river bridges, post offices and Revenue buildings and strengthen the Tufan Sena." If we take all these speeches into consideration, I do not see how it could be contended that they were not causing or calculated to cause alarm, danger or harm to person or property inthe District of East Khandesh. I am therefore of the kaxiax opinin that externment of this Doctor is legally feasible under section 46(3) of the Bombay District Police Act,1890. I must agree with the view of the Secretary Home Department, in thisrespect and disagree with the office note. I do not think theoffice has correctly interpreted the note H.M. (H.D.) at p.85 I do not think H.M. meant that externment was not legally feasible in thiscase I think he meant that it was not an adequate punishment when he noted that externment would not be appropriate in this case.

3. I agree with the office note that a proceeding under section 107 of the Criminal Procedure code is legally quite feasible inrespect of the speeches of Dr.Uttamrao. There is no doubt that

these speeches made at Daggri, Marwad and Kalameare have a tendency to disturb public tranquillity. Moreover, the Doctor has been preaching disobedience of the Grain levy Order. It is a wrongful act. It is also likely to create disorder in the District. Clearly therefore, the provisions of section 107 of the Criminal Procedure Code are attracted and the Doctor can be proceeded against under that section.

4. However in view of the Prime Minister's note that in any proceedings which might be instituted, we must not fail and must not be made to look ridiculous, I suggest that the Advocate General be requested to state his opinion whether an externment and a proceeding under section 107 are both legally feasible or either of them and if so, which one against Dr.Uttamrao Patil. A very early reply may be requested from the Advocate General.

Sd/

U.N. to the Advocate General, Bombay.

No.135-Confl dated 3-4-47.

EKM.11/6/

No.22 of 1947.

Advocate General Chambers,
High Court,
Bombay, 28th April 1947

Speech at Amalgaon: - (page 63 of the file).

This can be considered first as, except for the speech at Mamurabad (which is inoffensive) it is the only one of which there is a complete report. There are two objetionable passages:-

(1) " a march to the Collector's Kutcheri would be xx organised and even satyagraha would be resorted to". This follows immediately upon an exhortation to crop out against the grain levy.

(2) "Govt. servants were in the way .... should be made to face the British Govt.

The first read in the context is an exhortation not to comply with the grain levy, and so to disobey law orders. The second is a threat of violence to Government servants. On this speech compared with the others (Except the one at Mamurabad) as to which I see from page 84 of the file, para 4 that the substance could be proved) action can properly be taken under sec.107 of the Cr.P.Code and/or under 46(3) of the Dist.Police Act.

The second passage and calculated also to cause alarm to persons -viz. Govt. servants. The incitement to disobey lawful orders and to do violence to Govt. servants is in itself wrongful and it may cause others to commit wrongful acts. This is enough to bring into action sec.107. It is not

necessary.....

necessary that the speaker himself should commit the ultimate act to which he incites others. It is possible even to apply sec.117 of the Penal Code.

The speech delivered at Patonda on the 31.1.47 is in my opinion also actionable. The passage encertified at page 81 of the file is a definite incitement to wrongful acts, and calculated to cause alarm to persons and harm to property.

The speech delivered at Patonda on the 26.1.47 is in my opinion not one on which a prosecution can lie, but can be used for the purposes of action under sec.46(3) of Dist.Police Act and sec.117 of the C.P.Code.

The speech at Kalamasare may not support a prosecution, but can be also be used in the same manner as the speech at Patonda of the 26th January 1947.

Sd./-
26 April 1947.
Advocate General.

E.K.N./11.

Office of the H.L.A.

A copy of the Advocate General's opinion together with a copy of the notes recorded in this office is appended.

2. In view of the Advocate General's concurrence with the opinion expressed by my predecessor, it is now a matter for Government's consideration whether action should be taken under section 107 (read with section 117 as suggested by the Advocate General) Criminal Procedure Code or section 46(3) of the District Police Act.

Sd/ F.M.Lad.

Remembrancer of Legal Affairs.

U.O. to H.D.(Special)No.193 Confl dated the 6th May 1947.

EKM.11/6/

L.D.R.I. 155-Confl/22.8.47

Office of the R.L.A.

Section 144(1) of the Code of Criminal Procedure requires that in the opinion of the Magistrate there must be sufficient ground for proceeding under that section, and immediate prevention or speedy remedy is desirable. Paragraph 2 of sub-section (1) further requires that the order should state the material facts of the case. The Magistrate must also consider the question whether the direction is likely to prevent disturbance of the public tranquillity. It is because of these provisions that in form No.21 the words "it has been made to appear to me" have been advisedly used. The true import of these words is not that mere information from some quarter is conveyed to the Magistrate but that there is room for a well-grounded conjecture reasonably based upon circumstances disclosed to the Magistrate. The requirements of the section cannot be duly complied with by saying in the order merely that it was reported to the Magistrate that speeches of Mr.Bhide on communal subjects were of such a nature as to foment communal tension. The form and terms of the order made by the Magistrate do not show that after applying his mind to the facts before him he came to the conclusion that there was sufficient ground for proceeding under the section or that he was of ppinion that the direction he intended to give was likely to prevent disturbance of public tranquillity. The order does not give thematerial facts of the case. These defects are sufficient to vitiate the order. I generally agree with the criticism made by the present Home Secretary as the

district.....

District Magistrate of Poona in his letter at p.33. To add to this there is of course the minor irregularity of not adhering to the caption given in form No.21.

Sd/ P.M. Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.(Spl)No.275-Confl,dated the 20th June 1947.

EMN .11/6/

Office of the R.L.A.

It appears that during the fire that broke out in the court of the city Magistrate, Surat on 13-2-1946, all the Muddamal was gutted and for someof the muddamal articles claims have been preferred by the claimants; and somsof them relate to security deposits. The question raised for the consideration of the R.LA. is whether Government would be liable to make good the loss.

In Uma Purshad V.Secy.of States (18 Lah.380) the facts were as follows:-

Certain property stolen from the plaintiff which had been recovered by the Police was kept in the Malkhana under orders of the Magistrate during the trial of the thieves and receiver H.A., the man in charge of the Malkhana absconded with it. The Plaintiff then brought the present suit for its recovery or its price. The trial court decreed the suit, but on appeal the District Judge dismissed it, holding that the plaintiff had no cause of action against the Secretary of State. On appeal to the High Court it was held:

> "Theliability in this case having clearly arisen under the provisions of the Criminal procedure Code ie.e. the Municipal law of the land thedefence that the act was an act of state could not be invoked.
>
> Further the Secretary of State is not altogether immune from liability on accountof the wrongs committed by his servants (even if they are tortious) but can be held liable only under the circumstances in which a private employer can be rendered liable (Hatradas Ramchand v.Secy. of States). And as a private employer couldnot be made liable for the acts of his servants in circumstances like those in the present case no liability attached to Secretary of State on account of the Criminal act of the man in charge of the Malkhana; it being a felonious act, unauthorized by his employer.
>
> Further no implied trust has been established between the Secretary of State and the plaintiff appellant and therefore section 94 of the Indian Trusts Act, had no applications, to the case. But even if there were any such trust, the Secretary of state was not liable as no negligence on his part had been proved.
>
> Although the servants of the Secretary of State in exercise of the rights vested in them under the provisions of the criminal Procedure Code, came into possessions of the applant's property which they had recovered from the thieves and they were bound to return the property to the appellant, if so directed by the Magistrate, yet in no case did the relationship of Bailor and Bailee

come.....

come into existence between them and the Secretary of State.

Also even if there was a quasi bailment, the Secretary of State was not liable for the tort committed by his servant in embezzling the property, there being no proof that the Secretary of State did not take as much care of the appellant's property, lying with him as a man of ordinary prudence would under similar circumstances have taken of his own goods."

Applying the ratio decidendi of that case to the facts of the present case, it appears that the liability to return the Muddamal having arisen clearly under the provisions of sections 513 and 517 of the Criminal Procedure Code. the Municipal law of theland will apply. Government did not hold the proeperty as trustee nor as bailee . Consecuently, Govemnmen would not be liable to restore the property to the persons concerned It appears from the letter of the District Magistrate, at page 16 ante that fire was the result of some deliberate action and some mischief was strongly suspected. If fire was due to the mischief of some Government servants, Government would not be liable to restore the property becaude Government was not responsible in respect of Criminal acts of its servants (see Chesire v.Hailey, 1905,L.R.I.K.B.D.237). There was no negligence on the part of Government . In the circumstances it appears that Government would not be liable to restore the property in the present case.

Sd/

Remembrancer of Legal Affairs.

U.R. to H. D.No.8274, dated the 12th August 1947.

EKN.11/6/

Office of the H.L.A.

Where a non-cognisable case is investigated by the Police with the order of a Magistrate under section 155(2) of the Criminal Procedure Code it is necessary that the Police should make a report to the Magistrate under section 173 even if the Magistrate ~~xxxxxx~~ had not ~~xxxkixxxxxxxxxxx~~ directed a report to be so made (see 17 B.L.R.69). Consequently the Police will have to make a report to the Magistrate in the present case in the form prescribed by Government setting forth the name of the accused, the nature of information and the names of persons who appear to be acquainted with th circumstances of the case etc. Such report has not yet been submitted to the Magistrate. Although there is nothing to prevent the Inspector General of Police from taking action against the accused on the report of the departmental inquiry held against the accused on the same facts in respect of which the Police Investigation is pending it is undesirable to take such action pending the criminal proceedings (see A.G's opinion No.3. of 1946). Consequently the Police should first submit the report to the Magistrate and await his order. If the Magistrate proposes to issue process, the result of the trial should be awaited. But if he does not issue process, there would be no objection to the Inspector General of Police passing the necessary order in the Departmental inquiry.

Sd/

Remembrancer of Legal Affairs.

U.R. to H.D.C.No.339.Confl dated the 29th July 1947.

EKN .11/6/

Office of the R.L.A.

Attention of the Home Department is invited to R.L.A's opinion No.3842, dated the 18th April 1947 therein a similar question was considered. The presumption made by the District Magistrate, Ahmedaba is correct and the notification appointing Mr.Dave will have to be cancelled.

Sd

Remembrancer of Legal Affairs.

U.R. to H.D.No. 7800, dated the 29th July 1947.

EHR.11/6/

Office of the R.L A.

There is no legal objection to cancelling the Government Notifications, Political and Services Department, No.S.D.620 of 18-7-1946 with effect from 1-3-1947 as proposed by H.D.; and in fact that is the only legally feasible course to follow (cf.120 I.C.223; Hari Rao's Cr.P.C.p.37).

Sd/ P.H.Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No.3842, dated the 18th April 1947.

EKN.11/6/

Office of the R.L.A.

It is incumbent on the Magistrate to state the material facts in his order under section 144 Cr.P.C. (33 B.L.R. 1178). He should also state the emergency that led to the passing of the order (38 Mad.489) It is incumbent on him to state in his order the materials upon which his opinion as regards the existence of an emergency is based. Where an order does not set forth the materials on which it is based nor contains an indication of urgency, it is without jurisdiction (27 M.L.J.628). An order under section 144 Cr.P.C. should be addressed to a particular person or to the public when frequenting a public place, otherwise it is without jurisdiction (16 B.L.R. 684). The order passed by the District Magistrate, Belgaum at page 19 ante does not contain the material facts nor does it state the emergency individuals nor does it provide for the service thereof on the Arms dealers personally. Consequently the District Magistrate's order is without jurisdiction. The view taken by the Secretary, Home Department is correct.

Sd/-

Remembrancer of Legal Affairs.

U.O.R. to H.D.No7682

dated the 25th July 1947,

EKN.11/6/

Office of the R.L.A.

The question raised for the consideration of the Remembrancer of Legal Affairs is whether there will be any legal objection to placing a restriction regarding residence on a Government servant on bail.

There is difference of judicial opinion as to whether a restrictive condition confining a person to particular place can be imposed as part of the order granting bail. Section 500(1) of the Code of Criminal Procedure provides that as soon as the bond has been executed the person for whose appearance it has been executed shall be released and when he is in jail the Court admitting him to bail shall issue an order of release to the officer in charge of the bail and such officer on receipt of the order shall release him. When a Court orders the release of an accused under sec.500 it has no right or power to put any restrictions on the accused's movements and obviously when an accused person is released on the suretyship of another the intention is that the surety should have control over his movements. If the court orders that the accused shall be kept in an Asram, the accused is not released within the meaning of section 500 (172 I.C.862). If the Court cannot restrict the movements of an accused, whether a Government servant or otherwise, on bail, to his residence or to a particular place, much less can Government do so in respect of its servants on bail by an executive order. Consequently the proposal would not be legally feasible.

Sd/-

Remembrancer of Legal Affairs.

EKM.11/6/ U.R. to H.D.No.9017, dated the 5th September 1947.

Submitted.

Mr.P.C.Dave Asstt.Backward Class Officer, Ahmedabad, was appointed a special Magistrate under sec.14 of the Code of Cr.Procedure to try cases in which a member of the Criminal tribes was a party. As Mr.Dave's work as a Backward Class Officer was increasing the B.C.O.,Bombay Province,Poona requested that he should be relieved of his magisterial duties. A question then arose whether in order to achieve this, the notification under sec.14 was required to be cancelled and on a reference to R.L.A. he advised that the notification will have to be cancelled (vide opinion No.7800 dated 29.7.47 at p.5 ante.)

The Home Department has now reported as follows:"

"A subsequent communication has been received from the B.C.O. from which it appears that the idea was torelieve Mr.Dave only of the routine cases and the intentic of the B.C.O. that Mr.Dave should continue to be a special Magistrate was that he can exercise the Magistrial powers in important cases in which members of thecriminal tribes are involved."

To give effect to this intention of the B.C.O. H.D. proposes to cancel the notification under sec.14 and to appoint Mr.Dave as a Magistrate of the First Class under sec.12 so that the Distt.Magistrate can allot to him important cases according to his convenience.

R.L.A. is requested toadvise whether action can be ta ken as proposed (vide H.D.note at pp.7-8ante)

A "Seen and returned.

There is no legal objection to following the course proposed by H.D.A.

Sd/H.T.K.

R.L.A. Sd/-.H.Lad.

EXH.11/6/ U.O.R. to H.D.No.9282dt.17.9.47.

Office of the R.L.A-

Returning the complaint to Magistrate for recording reasons. Criminal Procedure Code,1898 section 202 Police Manual, Volume III Rule 1033(1)

The Inspector General of Police recommends that the case should be referred again to the Sessions Judge for consideration or to the High Court for final orders because, in his opinion, the view e-xpressed by the learned Sessions Judge is in conflict with the rule 1033(1)of the Bombay District Police Manual,Volume III page 635, which is based upon G.R.H.D.No.7578 of 21st September 1925. Presumably he means that the High Court should be invited to give a ruling on the question whether the Inspector of Police was not justified in returning the complaint to the Magistrate for recording his reasonsunder section 202 of the Criminal Procedure Code as provided in rule 1033(1) of the Police Manual. In the first place, so far as this case is concerned, this question has now become purely academic because the learned Magistrate has, in obedience to the directions given to him in that behalf by the District Magistrate, already recorded in detail his reasons for directing an enquiry by the Police under section 202. Secondly,even on merits, the view expressed by the Inspector General of Police is not correct. It is true that section 202 requires a Magistrate to record his reasons in writing before directing an inquiry by a Police Officer. The instructions in the High Court Criminal Manual page 25, paragraph 38 also insist upon the necessity of Magistrates recording their reasons for postponing the issue of process and for the inquiry of investigation under section 202. It is upon these instructions which are in terms of the section itself that Sir Maurice Hayward (himself a High Court Judge)seem to have relied in approving as H.M.the orders ultimately issued in G.R. H.D.No.7578 dated 21st September 1925. But, with respect to him, it must be pointed out that if the Magistrat omits to record reasons there is nothing in section 202 or any other section of the Criminal Procedure Code which entitles the Police Officer toreturn the complaint to

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the Magistrate. His, duty, as correctly pointed out by the learned Sessions Judge, is to carry out the judicial orders of the Magistrate. The Magistrate's omission to record reasons can be corrected only judicially at the instance of the aggrieved complainant. It would be opposed to the fundamental principles of the code of criminal procedure should that police officer refuse to carry out the Magistrate's order even on the ground of any alleged judicial defect in such order. Nor is it competent to a Police officer to judge the adequacy or otherwise of the reasons recorded by the Magistrate. Moreover as the facts stand, the learned sessions judge was fully justified in his criticisms against the course adopted by the Police Inspector and the District Superintendent of Police. The view taken by the Secretary, H.D. is correct and G.R., H.D.No.7578 dated 21st September 1928 and Rule 1033(1) of the Bombay District Police Manual Volume III require to be modified.

Sd/ P.M Lad.

Remembrancer of Legal Affairs.

U.R. to H.D. No.10939 dated 19th November 1947. EKN.11/6/

Office of the R.L.A.

Transfer of a case.

The Code of Criminal Procedure,1898.

The view expressed in the letter of the Registrar of the High Court, Bombay is correct. Since the appeal filed by Pawar is pending before the Court of Session established for the Allahabad Division which is subordinate to the Allahabad High Court, the appeal can be transferred under section 527, sub-section (1) of the Criminal Procedure Code only to some Court of equal or superior jurisdiction, subordinate to the High Court, Bombay. In Greater Bombay, there is no Sessions Court Subordinate to the High Court of equal or superior jurisdiction to the Court of Session established for the Allahabad Sessions Division (see clauses 22 to 25 of the Letters Patent). Consequently, the U. P. Government may be requested to amend their Notification No.3733-VI. 781-41 dated the 20th October 1947, directing the transfer of the Criminal appeal to the court of Session, Thana, or any other Court of Session in the Province nominated by Government.

Sd/ P. M. Lad.

Remembrancer of Legal Affars.

U.O. to H.D.,No.403-Confl. dated the 18-11-1947.

EKN.19/6/

Office of the R.L.A.

Forfeiture Orders Under S.99A(1) ------ Criminal Procedure Code 1898.

The first question raised for the consideration of R.L.A. is whether theprovisions of section 99A(1) of the Criminal Procedure Code are mandatory and the provincial authorities arelegally bound to take action to give effect to theorders of forfeiture passed by Government of another province. The words "thereupon any police officer may seize the same wherever found in British India" in section 99A(1), Criminal Procedure Code, clearly indicate that it is entirely within the discretion ofthe other provincial authorities to enforce an order of forfeiture passed by the Government of another Province. The practice in this Province also supports this interpretation; for, it seems that if the Government of this Province does not agree with the views of the Provincial Government prescribing the book or publication, it does notre-issue the notification for feiture. In view of the discretion which is thus already avilable to a Provincial Government and which it has in fact exercised, the amendment would appear unnecessary. It is very doubtful whether the promoters of the Bill would still pursue it; cases like that of the Satyarths Prakash would not now recur in the Dominion of India, and the possibility of Provinces holding conflicting views about any publication would be more infrequent in the future. On the other hand, the amendment would compel every Provincial Government to take separate action in respect of any publication; thereby making immediate prevention of its circulation almost impossible. Speedy action can naturally be taken in the province where the book or document is first published and it is better that Provinces should then be.....

be left to decide whether they should endorse the action taken by another Province rather than that they should be invited to examine the question afresh with a view to independent action. Preventive action in the matter of publications must naturally be uniform if it is to be effective. It is submitted that on these grounds the Bill need not be supported.

The second question relates to the following observations made by the Secretary, H.D."If it is legally possible the best course will be to make the Provincial Govt's notification binding on the province itself and that of the Union Govt.throughout India. Each Provincial Govt's notification can then be considered by the Union Govt. and extended to India if considered ~~by the Union Govt. and extended to India if considered~~ necessary." This proposal of the Secy.,H.D., does not appear to be legally feasible. "Public order" is entirely a provincial subject and the Central Govt. can have no responsibility forthe maintenance of law and order within the Province. It is true that "criminal law" is a concurrent subject but although the Central Govt. has power to amend the Criminal Procedure Code, it cannot so amend it as to vest in itself powers relating to the maintenance of law and order within a province. Consequently the Central Government cannot be given any power to extend to other provinces a Provincial Govt's notification issued under section 99A(1),Criminal Procedure Code.

Sd/P.N.Rad.

Remembrancer of Legal Affairs.

EXE.11/6/ U.O. to H.D.No.10926 dated the 17th November 1947.

Office of the R.L.A.

Meeting of employees in factory grounds in Walchandnagar.

The Magistrate has apparently held a view which is contrary to the opinion given by the R.L.A. in his No.3761 dated 17-4-1946. Ordinarily two courses are open to a party aggrieved by a Magistrate's decision under section 147 of the Code of Criminal Procedure,1898:- (1) an application in revision to the High Court and (2) a suit in a Court of competent jurisdiction. The first course is inadvisable in this case for the principal reason that though the High Court is invested with powers of revision, orders made by Magistrrates under this section are not ordinarily interfered with by the High Court save in exceptional cases, firstly because the object of such orders is to preserve peace and secondly because the aggrieved party has his remedy by a civil suit. The order is primarily made in the interest of preserving peace, and the High Court would naturally be loath to interfere. Besides the Magistrate has also come to the conclusion that the parties to these proceedings are not employees of the factory, i.e in other words, they are not residents within the limits of the factory. Finally, the time limit for the revision application has also now expired.

2. Before taking the matter to a civil court, the Department may inquire what action has been taken upon another connected case wherein it was proposed to notify the area as a municipality so that the streets in the area could be used as public streets.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to P.&S.D.No.11310,dated 26th Nov.1947.

EXN.12/6/

By Government Notification No.1068-A.P. dated 24th July 1947 the North-West Frontier Government with the consent of the Government of Bombay directed under section 527 of the Code of Criminal Procedure the transfer of Criminal Miscellaneous Application No.13 of 1947 from the Court of the Judicial Commissioner, N.W.F.P., to the High Court of Judicature, Bombay. The question raised for the consideration of the R.L.A. is whether in view of the Indian Independance Act, 1947, the Bombay High Court will have jurisdiction to try this case.

2. It will serve no useful purpose for the R.L.A. to give an opinion on this question since the High Court of Bombay is already seized of the proceedings and will be invited to express its opinion on the question of jurisdiction; more so because the competency of the Provincial Government in transferring these contempt proceedings under section 527 of the Criminal Procedure Code is itself being questioned as appears from the Press report at p.25 of the file.

3. I may add, however, the following remarks. Sub-section (3) of section 18 of the Indian Independence Act, 1947, enacts that save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf. The Code of Criminal Procedure would hereafter cease to be a law extending to the whole of India and embracing

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the entire judicial system constituted under it including the High Courts. It will continue as a separate law of the Dominionof India and the Dominion of Pakistan, and to that extent the very foundation of the transfer by which jurisdiction was given to the Bombay High Court disappears. The High Court of Bombay would now have to act under section 527(2) of the Code; and it is extremely doubtful whether it can so purport to act in respect of proceedings which belong to another Dominion in the sense which arose in that Dominion and the parties to which are subjects of that Dominion. There is the further complication that the proceedings areproceedings in contempt of Court, in the Dominion of Pakistan to take suitable action. There is also this difficulty that it may not be possible for the High Court of Bombay to enforce the attendance of the parties who are not now amendable to its jurisdiction; and similarly it would in practice be impossible to give effect to theorder which the High Court may eventually make in the proceedings.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No 8602, dated the 25th August 1947.

EKN.12/6/

Office of the H.L.A.

The only remark I would like to add to my former opinion is that judging by the fate which is now reported to have befallen Mr. Meherchand Khanna the Provincial Government of the N.W.F.P. would not be anxious to transfer the case to Bombay . That Government and the High Court of that Province must take the initiative; and the Government of Bombay need not move in the matter.

Sd/ P.N.Lad.

Remembrancer of Legal Affairs.

U.R. to H.D.No.13101, dated the 18th December 1947.

EKN.12/6/

Office of the R.L.A.

Sanction to prosecute for accepting illegal gratification.

Indian Penal Code,1760; Criminal Procedure Code,1898, and Preventionof Corruption Act,1947.

R.L.A's opinion No. 6353,dated 19.6.47.

The charge against Mr. Gilbert G.Christian in both these cases is that, while working as a First Class Magistrate, he accepted illegal gratification for granting bail andalso for refraining for passing a sentenceof imprisonment. The question referred tothe R.L.A. is whether the sanction of Government is necessary for launching prosecutions against Mr.Christian on these charges.

2. Under section 197 of the Code of Criminal Procedure when any person who is a judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some Higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties, no court shall take cognisance of such offence except with theprevious sanction, in the case of a person employed in connection with the affairs of a Province, of the Governor. Sub-section (2, further requires that the Governor may determine the person by whom, and the manner in which, the offence or offences for which the prosecutionof such magistrate or public servant is to be conducted and may specify the court before which the trial is to beheld. It appears that Mr. Christian was at the time when the offence was committed a Mamlatdar and as such appointed by and

removable.....

removable by the Commissioner; whereas at the time of his suspension he was acting as a District Deputy Collector which appointment could be made by Government If we look to Mr.Christian's status at the time the offence is alleged to have been committed, it is obvious that he was then both a judge and, in any case, a magistrate. Illustration B to section 19 of the Indian Penal Code says that a magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to find or imprisonment with or without appeal is a judge. From that point of view it would be apparent that the sanction of the Governor would be necessay. The same result would follow if regard is had to Mr.Christian's status at the time of his prosecution; for sanction would still be necessary as he was then a public servant not removable from his office save by or with the sanction of the Provincial Government. The point whether a magistrate or a judge accepting illegal gratification in connection with a case pending before him can be said to be acting or pumporting to act in the discharge of his duties is not quite free from doubt. There have been conflicting decisions on the question of the principle involved in that point; and perhaps in Zutshi's case (see 49 Bom.L R. 809) which is pending before the Privy Council, the question may be finally settled. In the meantime, to be on the safe side, it is better to give the sanction required by section 197.

3. Sanction is required also under section 6 of the Prevention of Corruption Act, 1947. In my opinion No. 5353, dated the 19th June 1947, the advice was given that this sanction should be in addition to the sanction

required.....

required by section 197 of the Code of Criminal Procedure. The principal reasons for that advice were that, whereas the sanction under section 6 is to be given by the Provincial Government, the sanction under section 197 even after the adaptation is to be given by the Governor, which would make a technical difference to the authority giving sanction. Secondly, section 6 is wider in scope and applies to all public servants whereas section 197 is restricted to certain classes of officers and public servants. Thirdly, under sub-section (8) of section 197 already quoted, the Governor has the power to determine other things such as the tribunal etc., in addition to sanction. It would be safer in this case, therefore, to give sanction both under section 197 of the Code of Criminal Procedure and under section 6 of the Prevention of Corruption Act, 1947, the first by the Governor and the second by the Provincial Government. The actual draft of the sanction will be scrutinised after it is received from the Department.

Sd/ P.M.Nad.

Remembrancer of Legal Affairs.

U.R. to R.D.No.398-Confl, dated 18th November 1947.

EKN.12/6/

Office of the R.L.A.

Messrs.H.G. Prabhavalkar, M.R.Teredesai, Y.B. Shinde and H.A.Khatib were invested with the powers of a third class magistrate while they wereholding the posts of Treasury Aval Karkuns or Extra Aval Karkuns. They have now been appointed to the posts of Circle Officers. The question raised for the R.L.A's consideration is whether they can continue to exercise the magisterial powers formerly conferred upon them.

2. Presumably these officers were invested with magisterial powers not by name but by virtue of their office. If they were invested by name, the change of office would not affect their exercise of magisterial powers (see Queen Empress Vs. Rama, Ratanlal's Unreported Criminal Cases, p.322.)

3. Section 40 of the Code of Criminal Procedure provides that whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature, within a like local area under the same Provincial Government, he shall, unless the Provincial Government otherwise, directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed. The point for consideration, therefor , is whether the office of Circle Officer is an equal or higher office of the same nature. It is possible to say that the Treasury Aval Karkuns or extra Aval Karkuns and Circle Officers areall revenue officers. However, as it is a question of

EKN.12/6/

exercising--------

exercising magisterial powers, the words "an equal or higher office of the same nature" must be strictly construed; and they were so construed in the case of Crown Vs. Karimbux and 22 others (27 Sind Law Reporter p.427) where a Subordinate Judge at J in the Upper Sind Frontier District was invested with powers of a Magistrate of the First Class and was transferred from J to H in his capacity as a Subordinate Judge but not as a Subordinate Judge and First Class Magistrate. To avoid all doubts it would, therefore, be safer to empower the officers concerned by a fresh notification.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.H. to H.D.No.11309, dated the 26th November 1947.

EKN.12/6/

Office of the R.L.A.

The draft sanction order on page 10 ante, is in order.

2. Since under section 58 of the Bombay Hereditary Offices Act, 1874, an officiator is removable from his office by the Collector only with the previous sanction of Government sanction under section 197 of the Criminal Procedure Code would also be required. The requisite draft sanction order is sent herewith.

Sd/ P.M.Mad.

Remembrancer of Legal Affairs.

U.R. to R.D.No.11894 dated the 10th December 1947.

EKN.12/6/

Office of the R.L.A.

It would be impolitic for Government to issue instructions to Magistrate to award deterrent punishment in such cases. The proper course wouldbe to issue instructions to the Police ~~Prosecutors~~ Prosecutors to press for deterrent punishment and if the Magistrate still pursue their policy to move for enhancement in an actue case.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to P W.D.No.12004 dated the 12th December 1947.

BKN.12/6/

Office of the R.L.A.

The facts as reported in the charge-sheet show that there was actually wrongful confinement and a threat of an accusation to the effect that the person confined had come with the object of committing theft of Government money. The words used in the charge-sheet are "sarakari Khajina"; but presumably in the village concerned there could not be a Government treasury, and what is intended is probably collection of Government money. It is also stated in the charge-sheet that the papers like Panchnama etc. framed by the accused were subsequently destroyed. The question for consideration is what offences are disclosed upon these facts.

2. There is no doubt that the offence of wrongful confinment to extort property punishable under section 347 was committed. It is difficult to say that the offence of robbery was committed. Robbery requires extortion accompanied by a threat of instant death, instant hurt or of instant wrongful restraint; whereas here there was something more than putting the person in fear of instant wrongful restraint since he was actually put in wrongful restraint. A threat of accusation would not bring the case within robbery. The proper section to apply would be section 384, namely, extortion. The facts reported are not sufficient to show whether the aggravated offence of extortion under section 386 or section 389 was committed. If necessary, the facts may be verified with a view to decide whether such aggravated offence was committed. There would be no objection to including in the charge the offences under sections 161 and 201. The mention of section 209 both in the charge-sheet and in the correspondence seems to be a mistake. Similarly where-as the

charge...

charge-sheet mentions section 34, the correspondence mentions section 134 which is also a mistake.

3. In short, the offences to be mentioned in the sanction should be those under sections 347,384, 161,201 and 34 of the Indian Penal Code. For the sake of abundant caution, sanction must also be given under section 6(b) of the Prevention of Corruption Act, 1947. Although that Act became law not only after the offence was committed but after the charge-sheet was framed; but it might be argued that, that being a procedural provision intended for the benefit of an accused, sanction under that enactment would also be necessary.

4. Two draft sanctions are enclosed herewith.

Sd/P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to R.D.No.13007, dated the 6th December 1947.

EKN.126/

Office of the R.L.A.

The R.D. has not forwarded any statement of facts upon which the case will go to a court of law. The facts which can be gathered from the report of the Police Sub Inspector, Anti-Corruption Branch, Dharwar, do not show that there was any conspiracy or common concert between the Kulkarni and the Circle Inspector for committing the offence of taking illegal gratification punishable under section 161 of the Indian Penal Code. The facts do not disclose any element which would show that the Kulkarni abetted the Circle Inspector in the commissi of the offence. At best, he is a mere accessory after the fact, and his conduct in prevention the discovery of the money would come under section 201. That is the only offence which can be legitimately charged against him. The draft sanction is, therefore, confined to that offence only. Since the offence under section 161 is not being charged against him either principally or by way of abetment, no sanction under section 6(b) of the Prevention of Corruption Act,1947,would be necessary.

2. In future,R.D. is requested in all sanction cases to supply a complete statement of the facts upon which the case is proposed to be submitted to a court of law.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.O. to R.D.No.13251, dated the 12nd December 1947.

BKN.1E/6/

Office of the R.L.A.

Conspiracy to obtain cloth.

Criminal Procedure Code,1898.

Having regard to the system of cloth rationing which obtains in Ahmedabad this would appear to be a case of conspiracy of doing an act which is not illegal by illegal means, since illegal means include offences. Sanction under section 196A(1) would be necessary.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.O. to H.D.,No.13314, dated the 23rd December 1947.

RRE.12/6/

Office of the R.L.A.

A revised draft sanction order under section 197 of the Criminal Code is forwarded herewith.

2. As the accused is a Police and Revenue Patil, not removable without the sanction of Government, sanction under section 6(b) of the Prevention of Corruption Act would also be necessary. A draft sanction order under that section is also forwarded herewith.

Sd/ P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to R.D.No.13419, dated the 27th December 1947.

EKN.12/6/

Office of the R.L.A.

The following paragraph may be added to the sanction order:-

"And whereas on or about the same date, the said Mr.O.M.Ansari obtained by abuse of his position as a public servant part of the unloade petrol from the Public Health Laboratory Poona, and dishonestly misappropriated and converted the same to his own use by transferring it in the tank of his private car No.BYF-4229, and running his car with the petrol which was entrusted to him and was under this control as a public servant".

Sd/ P.M.Lad:

Remembrancer of Legal Affairs.

U.H. to H.A L.G.D.No.141-Confl dated the 30th March 1948.

BKN.12/6/